Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR, Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX II (pages 83-120)

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TABLE OF CONTENTS

Page

Johnston-Taylor, Et. Al., v. Gannon, Et. Al.,
(W.D. Mich., Hon. Richard Enslen).....83-a

David Arganian v. Lansing Community College, Et. Al.,
(Circuit Court, Mich, Hon. Robert Holmes Bell)...100-a

David Arganian v. Lansing Community College, Et. Al.,
Circuit Court, Mich,
Hon. Robert Holmes Bell)
Order Staying Discovery.....118-a

Petitioners Letter Of Termination, July 22, 1983.....120-a

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. G 86-661

PHILIP J. GANNON, individually and as President of Lansing Community College, LANSING COMMUNITY COLLEGE, and THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.

OPINION

This action concerns defendants' decision to dismiss the deceased father and spouse of the Taylor plaintiffs, Edward Taylor, and David Arganian as full-time professors at Lansing Community College. The Taylor plaintiffs have sued both on their own behalf and, with regard to Sallie Elizabeth Johnston-Taylor, as administratrix of the estate of Edward Taylor, alleging that defendants' actions violated their constitutional rights and the constitutional rights of

Edward Taylor under the due process clause of the fourteenth amendment and under the first amendment, as incorporated by the fourteenth amendment. They also allege violations of the Michigan Wrongful Death Statute and the Michigan Elliot-Larsen Civil Rights Act. The Arganian plaintiffs allege violations of their due process rights and of the Elliot-Larsen Civil Rights Act. Presently before the Court for decision is defendants' November 6, 1986 Motion to Dismiss Portions of Plaintiffs' Complaint. For the reasons discussed below, the Court will grant such motion in part and will deny it in part.

Facts

Edward Taylor and David Arganian were both long-time members of the faculty of Lansing Community College ("LCC"). Mr. Arganian began teaching at LCC on September 11, 1961, and Mr. Taylor began teaching at LCC on September 5, 1966. In July 1965, according to plaintiffs' complaint, LCC established a separate governing Board of Trustees. Prior to that time, the college apparently was subject to the direct authority of the Lansing School District. Plaintiff David Arganian alleges that on or about June 7, 1967 the college granted him tenure, evidently by making him an Associate Professor. Both Mr. Taylor and Mr. Arganian allege, moreover, that they received tenure, or at least a "reasonable expectation of continued employment until age

70, unless discharged for just cause" (Complaint, sec. 19), under a collective bargaining agreement the college entered into with the Michigan Association for Higher Education ("MAHE") in 1981. Mr. Taylor was the president of the MAHE from 1964-1970, 1971-1972, and 1981-1984, and in that position was the chief negotiator for the union during the 1981 contract negotiations. Plaintiffs allege that Mr. Taylor also was "the leading critic of all defendants policies and practices," id. sec. 68, and in particular strongly opposed the layoffs that led to plaintiffs' present action.

In 1983 LCC found itself in financial difficulty and had to make budget cutbacks. Plaintiffs allege that in June 1983 defendant Gannon ordered the deans of the college's divisions to select faculty for termination as full-time employees of the college. Plaintiff David Arganian learned on or about July 26, 1983 that his dean had selected him for termination of employment, allegedly because he was not an effective teacher. Mr. Taylor's dean apparently did not select him for termination, but defendant Gannon allegedly overrode the dean's decision and selected Mr. Taylor for termination of employment. The Board of Trustees made the final decison to terminate Mr. Arganinan's and Taylor's status as full-time professors at its July 1983 meeting. Plaintiffs allege that neither Mr. Arganian nor Mr. Taylor received any kind of pre-termination hearing at which they

could have challenged the Board's decision to discharge them from full-time status. Both professors apparently were offered the opportunity to continue teaching at the college on a part-time basis.

The MAHE did file a grievance on the professors' behalf challenging the Board's decisions. On December 19, 1984 an arbitrator decided that the Board's decisions were proper under the collective bargaining agreement. The arbitrator, noting that the issues before him were "contractual rather than statutory or constitutional in nature," Decision at 12, considered whether "the Board honestly concluded that there was a budget problem and made an honest judgment that a staff reduction would provide a solution or part of a solution consistent with sound financial management and the educational objectives of the College." Id. He concluded that the Board acted in good faith, id. at 15; that the Board gave adequate notice of its intent to lay-off the affected professors, id.; that the MAHE had adequate input into the decision-making process, id. at 16-17; and that the Board properly formulated and applied criteria for deciding who should be laid-of. Finally, the arbitrator concluded that neither Mr. Arganian nor Mr. Taylor had been discriminated against in violation of the collective bargaining agreement. In particular, he concluded that Mr. Taylor had not been laid-off because of his union activities.

On July 8, 1986 plaintiffs filed a four-count complaint challenging defendants' actions. Count I of the complaint is brought pursuant to the provisions of 42 U.S.C. sec. 1983, and alleges that defendants' actions violated plaintiffs' procedural and substantive due process rights. Specifically, plaintiffs argue that defendants' decisions to lay-off David Arganian and Edward Taylor were arbitrary and capricious, and that defendants unlawfully denied these professors their right to a pre-termination hearing. Count II is brought solely on behalf of the Taylor plaintiffs. They argue that defendants violated Mr. Taylor's first amendment rights because they decided to lay him off in reprisal for his union activities. Plaintiffs further allege that as a result of defendants' actions, Mr. Taylor committed suicide. Count III is a state-law wrongful death claim brought on behalf of the Taylor plaintiffs. Finally, in count IV both the Taylor plaintiffs and the Arganian plaintiffs allege that defendants discriminated against Mr. Taylor and Mr. Arganian on account of their age in violation of Michigan's Elliot-Larsen Civil Rights Act.

Standard of Review

Since defendants bring their motion pursuant to rule 12(b) (6) of the Federal Rules of Civil Procedure, I cannot grant it unless "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which

would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering the sufficiency of plaintiffs' claims, moreover, I must accept all well-pleaded allegations of their complaint at face value and must construe them in the light most favorable to the plaintiffs. Scheur v. Rhodes, 416 U.S. 232,236 (1974); Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1182 (6th Cir. 1975).

Discussion

Defendants raise eight (8) grounds in support of their motion to dismiss. The Court will discuss them in the order they are presented in defendants' brief.

Defendants' first ground for dismissal is that the Taylor plaintiffs, in their individual capacities, and plaintiff Lillian Arganian lack standing to bring this suit. With regard to the Taylor plaintiffs, defendants argue that these plaintiffs are in essence bringing claims on Mr. Taylor's behalf and that under Michigan law only the personal representative of Mr. Taylor's estate has standing to bring such claims. M.C.L. 600.2922. Defendants further argue that in count I of the complaint, the Taylor plaintiffs, in their individual capacities, and plaintiff Lillian Arganian are improperly attempting to assert the rights of third parties, i.e., plaintiff David Arganian and Mr. Taylor. Plaintiffs respond that they are merely attempting to assert their right to recover for the losses they have suffered because of

defendants' actions.

The Court will dismiss the claims of the Taylor plaintiffs, in their individual capacities, with regard to count IV of the complaint. Plaintiff Ms. Johnston-Taylor may pursue her claim in count IV as representative of the estate of Edward Taylor, and the Arganian plaintiffs may also pursue their claims in count IV. I must dismiss the other plaintiffs' claims under Count IV, however, because such claims are brought to assert the right of Mr. Taylor and plaintiff David Arganian, and thus with regard to Mr. Taylor can be brought only by the personal representative of his estate. M.C.L. 600.2922(2); Herbert v. Cole, 115 Mich. App. 452 (1982). This same holding applies to count III of the complaint.

Finally, I will deny, without prejudice, defendants' motion with regard to counts I and II because there is some case law supporting the right of the Taylor plaintiffs and of plaintiff Lillian Arganian to pursue these claims on their own behalf to recover for the injuries they have suffered because of defendants actions. Compare Bell v. City of Milwaukee, 746 F.2d 1205, 1241-53 (7th Cir. 1984) with Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986). Specifically, these plaintiffs may be able to argue that defendants' actions have deprived them of their constitutionally protected liberty interest in the continued companionship, comfort, and

support of their husbands and parent. I will decline to decide this standing issue now because it was not adequately briefed by the parties. Defendants are free, however, to renew their motion to dismiss the claims of the Taylor plaintiffs, in their individual capacities, under counts I and II, and the claim of plaintiff Lillian Arganian under count I, when they are prepared to submit a thorough brief on the issue. I note here that this issue does not affect the right of plaintiff Ms. Johnston-Taylor to pursue her claims under counts I and II as the personal representative of the estate of Edward Taylor, or the right of plaintiff David Arganian to pursue his claims under count I on his own behalf.

Defendants' second ground for dismissal is that the Court should dismiss plaintiffs' claims against LCC, the members of the Board of Trustees in their individual capacities, and Mr. Gannon because these defendants lacked the power to terminate or to lay-off Mr. Taylor and Mr. Arganian. Defendants argue that pursuant to Michigan law, only the Board of Trustees has the power to take such personnel actions. See M.C.L. 389.124(b); Blanchard v. Lansing Community College, 142 Mich. App. 446, 449 (1985). The Court will grant defendant's motion with regard to LCC, and will deny it with regard to the remaining defendants. I grant the motion with regard to LCC because plaintiffs have failed to demonstrate how the college, as an entity, can be

held liable for their injuries. I will deny the motion with regard to the board members because it is clear that each member voted as an individual, and the parties have failed to discuss any distinctions the Court should make between the actions of the board members in their individual capacities and their actions in their official capacities.

Finally, I will deny the motion with regard to defendant Gannon because it is unclear what role he played in the decision-making process. I am not sure that he is immune from liability simply because the Board of Trustees had the ultimate authority to retain or to discharge Mr. Taylor and Mr. Arganian. See van Houdnos v. Evans, 807 F.2d 648, 653-54 (7th Cir. 1986). Plaintiffs allege, for example, that defendant Gannon"singled out Plaintiffs decedent Taylor for termination because of his union activities and exercise of his first amendment rights." Complaint, sec. 49. If true, this allegation could state a claim against defendant Gannon even though the Board had the final decision-making authority because defendant Gannon's actions would have been a casual factor in producing an unconstitutional result. Defendants may renew this aspect of their motion when they are prepared to establish uncontested facts demonstrating Mr. Gannon's entitlement either to dismissal or to a judgment in his favor.

Defendants next claim that they are entitled to the

defense of qualified immunity under the Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982). In Harlow, the Supreme Court held that a government official is entitled to immunity from a suit raising claims for monetary relief if the actions at issue did not "'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Davis v. Scherer, 82 L. Ed.2d 139, 147 (1984), quoting Harlow, 457 U.S. at 818. Under this standard, "[w]hether an official may prevail in his qualified immunity defense depends upon 'the objective reasonableness of [his] conduct as measured by reference to clearly established law.'" Id. (citation omitted). Defendants base their motion for qualified immunity on two factors. First, they argue that plaintiffs have failed to specify the bases for their claims. Second, they argue, in essence, that they acted in good faith.

The Court will deny defendant's motion without prejudice. I find that plaintiffs have raised three clearly defined and well-established constitutional claims: (1) that defendants' actions were arbitrary and capricious and thus violated plaintiffs' substantive due process rights; (2) that Mr. Taylor and Mr. Arganian had a constitutionally protected property interest in not being dismissed except for just cause, and that defendants acted illegally by failing to provide them with a pre-termination hearing or otherwise to

protect their due process rights; and (3) that defendants violated Mr. Taylor's first amendment rights by discharging him because of his union activities. I believe in particular that plaintiffs have adequately stated a claim that defendants violated their procedural due process rights. It may be that Mr. Taylor and Mr. Arganian had no constitutionally protected property interest in their continued employment with LCC. Defendants have failed, however, to provide me with the materials, such as a copy of the collective bargaining agreement, that I would need to make this determination, and I cannot accept their implicit argument that any deprivation that may have occurred was de minimus. It appears that at a minimum, Mr. Taylor and Mr. Arganian were reduced from full-time to part-time status. I regard this reduction as significant enough to trigger the protections of the due process clause. Compare Carter v. Western Reserve Psychiatric Habilitation Center, 767 F2d 270, 272 n.1 (6th Cir. 1985). With regard to plaintiffs' other claims, once again, accepting the allegations of the complaint as true, I find no basis for recognizing defendants' claim of qualified immunity, at least at this time. Defendants may renew their claim when they are prepared to discuss the relevant case law and the facts of this case in detail.

Defendants' fourth argument is that the Eleventh Amendment bars plaintiffs' claims. Defendants argue that

LCC is an arm of the state, that the individual defendants are state officers and employees, and that any judgment plaintiffs may recover would be paid out of state funds. In support of their argument, defendants cite and discuss a number of state laws indicating that the state exerts a significant amount of control over LCC and provides a significant portion of its operating budget. The Court, however, will decline to grant defendants' motion, at least at this time. The Sixth Circuit has indicated that the determination of whether a government entity is an arm of the state entitled to Eleventh Amendment immunity is essentially factual in nature and requires a court to consider a number of factors. Hall v. Medical College of Ohio, 742 F.2d 299, 301-07 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985); see also Hutchins v. Board of Trustees of Michigan State University, 595 F. Supp. 862, 863-68 (W.D. Mich. 1984). Defendants' argument may well have merit. I am hesitant, however, to decide this significant Eleventh Amendment immunity issue on the basis of the incomplete record before me, and thus will decline to grant defendants such immunity at this time. Defendants should raise this defense either at trial or by a properly supported motion for summary judgment.

The fifth argument defendants raise is that plaintiffs' claims are barred by the doctrines of res judicata and

collateral estoppel because of the arbitrator's decision. The Court must reject this argument because the Supreme Court has ruled, in an unanimous decision, that the decision of a labor arbitrator made pursuant to a collective bargaining agreement cannot bar a subsequent claim for relief under section 1983. McDonald v. West Branch, 466 U.S. 284, 292 (1984). The Supreme Court analyzed the features of an arbitration proceeding under a collective bargaining agreement in McDonald, and concluded that "[i]t is apparent...that in a sec. 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial." Id. The arbitral decision may, however, be admitted as evidence in the section 1983 action. Id. n. 13. I do not believe that the Supreme Court implicitly overruled McDonald in University of Tennessee v. Elliot, 92 L. Ed.2d 635 (1986). The Supreme Court never discussed McDonald in Elliot and, more importantly, Elliot concerned a decision reached by a state administrative law judge as opposed to a labor arbitrator. I also cannot accept, at least at this time, defendants' argument that Mr. Taylor's and Mr. Arganian's due process rights were either non-existent or fully satisfied in this instance. As I indicated previously, neither party has provided me with the documents I need to decide this issue. I also note that if plaintiffs did enjoy constitutionally protected property interests, then I must resolve the issue of

what process they should have received by applying constitutional principles and not the terms of the collective bargaining agreement. See Cleveland Board of Education v. Loudermill, 84 L. Ed.2d 494, 503 (1985).

Defendants' sixth argument is that Michigan's doctrine of governmental immunity bars Count III of the complaint, which is the Taylor plaintiffs' claim under the wrongful death statute. See Ross v. Consumers Power Co., 420 Mich. 567 (1984). I believe that defendants' argument has merit with regard to plaintiffs' claim against the Board as an entity. In Ross, The Michigan Supreme Court held that "[a]ll governmental agencies (state and local) are immune from tort liability for injuries arising out of the exercise or discharge of a non-proprietary, governmental function." Ross, 420 Mich. at 591. Operation of the college clearly is a governmental function, and the Board thus is entitled to claim immunity from count III.

The Court does not believe, however, that there are sufficient facts in the record for it to decide whether the individual defendants may also claim governmental immunity. The Michigan Supreme Court held in Ross that individual employees "are immune from tort liability only when they are a) acting during the course of their employment and are acting, or reasonably believe they are acting, within the scope of their authority; b) acting in good faith; and c)

performing discretionary-decisional, as opposed to ministerial-operational, acts." Id. at 592. I believe that the individual defendants probably could satisfy the first and third prongs of this standard. There is insufficient evidence in the record, however, for the Court to determine whether they acted in good faith, and I thus will deny their motion.

Defendants further argue that count III is barred by the exclusive remedy provisions of the workers' compensation statute since Mr. Taylor's suicide allegedly resulted from defendants' employment related actions. See M.C.L. 418.13-1(1). The Court rejects this argument. Since a wrongful death act claim is derivative in nature, to decide this issue the Court must examine whether the workers' compensation statute would bar Mr. Taylor from pursuing the substantive claim on which count III is based if he were still alive. See Barnes v. Double Seal Glass Co., 129 Mich. App. 66, 70-71 (1983). Since the wrongful death claim is based on defendants' alleged violations of Mr. Taylor's constitutional rights and his rights under the Elliot-Larsen Civil Rights Act, it is not barred by the workers' compensation statute. If Mr. Taylor were alive, he could pursue such claim on his own behalf. See Napier v. Jacobs, 145 Mich. 285, 302 (1985). The Taylor plaintiffs thus should be free to pursue their wrongful death claim.

Defendants' final argument is that the Court must

dismiss count III because Mr. Taylor's death occurred almost three years after the allegedly wrongful lay-off and thus could not have been caused by the lay-off. The Court must reject this argument. In ruling on a 12(b) (6) motion, I must accept plaintiffs' allegations as true. Defendants' argument may have merit. They should raise it, however, either at trial or by a motion for summary judgment.

The Court will enter an order in accordance with this opinion.

Dated in Kalamazoo, MI: April 9, 1987

S/_____

RICHARD A. ENSLEN

U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. G 86-661

PHILIP J. GANNON, individually and as President of Lansing Community College, LANSING COMMUNITY COLLEGE, and THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

ORDER

In accordance with the opinion dated April 9, 1987;

IT IS HEREBY ORDERED the defendants' Motion to Dismiss is GRANTED in part and DENIED in part;

IT IS FURTHER ORDERED that defendant Lansing Community College is DISMISSED from this action.

Dated in Kalamazoo, MI April 9, 1987

S/_____
RICHARD A. ENSLEN, U.S. DISTRICT JUDGE

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DAVID ARGANIAN,
Plaintiff,
vs File No. 83-50768-CL
HON. ROBERT HOLMES BELL

LANSING COMMUNITY COLLEGE, THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, PHILIP J. GANNON, President, and SAM KINTZER, Divisional Dean, Lansing Community College,

Defendants

OPINION AND ORDER OF THE COURT

Subsequent to their answer to plaintiff's first amended complaint, defendants have submitted to the Court joint motions for accelerated judgment and summary judgment. As to those portions of plaintiff's claim which are based on statutory and contractual rights, defendants contend they are entitled to accelerated judgment for the reason that plaintiff has not exhausted his administrative remedies. Conjunctively, defendants have moved for summary judgment, contending that, to the extent plaintiff has attempted to make out a claim in tort, he has failed to

state a claim upon which relief can be granted.

For purposes of these motions, most of the facts are not at issue. It appears that plaintiff, David Arganian, was hired by the Lansing Board of Education to teach at Lansing Community College (LCC) in 1961. From that time forward, plaintiff served LCC continuously as teacher and temporarily as department chairperson until July 26, 1983, when he was notified that he wold not be offered a contract for the 1983-1984 academic year. Plaintiff's "dismissal" was part of a staff reduction effort purportedly made necessary by the worsening financial status of LCC. In addition, plaintiff was allegedly informed by oral statement of Ronald Dove, Personal Director, that he was among the twenty-two faculty members terminated because he had received low student and administrative evaluations.

In response, plaintiff has filed the instant suit contending his dismissal constitutes a "termination for cause" under the guise of an employee lay-off. As such, plaintiff asserts, the procedure followed by LCC, lacking proper notice and opportunity for hearing, has violated his statutory, contractual and constitutional rights.

I. Teachers' Tenure Act

In Count I of his complaint, plaintiff asserted rights purportedly conferred by the Teachers' Tenure Act (TTA), MCLA 38.71 et seq: MSA 15.1967 et seq. Defendants have

countered by insisting through motion for accelerated judgment that, even if such rights apply to plaintiff, the court is without jurisdiction to adjudicate them. Whether plaintiff is a "certified" and "tenured" teacher within the purview of the TTA is a difficult question. See Shaw v Macomb Community College, 389 Mich 69; 204 NW2d 129 (1973). However, it is a question which This Court need not address. Even if, arguendo, plaintiff is a tenured teacher and does have rights under the TTA, the proper forum for vindication of such rights is the State Tenure Commission, not the circuit court. Review of TTA rights by This Court is available only after administrative remedies have been exhausted before the commission.

Because tenure commission review is available to a tenured teacher discharged by the board, the doctrine of exhaustion requires resort to this remedy before the case is reviewable in circuit court. Elgammal v Macomb Board of Education 83 Mich App 444, 449; 268 NW2d 679 (1978). Plaintiff maintains, however, that his rights under the TTA are not his exclusive remedy. Citing Shippey v Madison District Schools, 55 Mich App 663; 223 NW2d 116 (1974), plaintiff argues that he need not exhaust his remedies before the tenure commission since his complaint also includes a breach of contract claim. While incontestably good law, the Shippey holding is inapposite. It states simply that the TTA

does not deprive the circuit courts of jurisdiction to decide a breach of contract dispute. That a circuit court may have jurisdiction over a contract claim, however, does not confer jurisdiction over a parallel claim asserting rights under the TTA. In fact, the Shippey court itself said as much, holding that "the circuit judge properly concluded that he lacked jurisdiction to consider amy claim under the teacher's tenure act." Id. 5 Mich App 668. This Court is in full agreement.

Accordingly, defendant's motion for accelerated judgment as to plaintiff's TTA claim is granted for the reason that plaintiff has failed to exhaust his administrative remedies, thereby leaving This Court without jurisdiction.

II. Collective Bargaining Agreement

In Counts II,III,IV and V of his complaint, plaintiff has alleged that the procedure utilized in dismissing him violated several provisions of the governing collective bargaining agreement. In seeking accelerated judgment as to these contract claims, defendant contend that judicial consideration is premature because the contractual grievance procedures, culminating in compulsory arbitration, have not yet been completed. Again, the issue is whether plaintiff can properly seek redress in circuit court with respect to rights for which alternative methods of dispute resolution have been provided, in this instant agreement of the parties.

Plaintiff has not suggested that the alleged

infringements of contractual rights are not properly arbitrable. Rather, plaintiff contends he need not exhaust such remedies before proceeding in circuit court because his complaint includes a constitutional claim, which can be adjudicated only in court. Kewin v Board of Education of Melvindale-Northern Allen Park Public Schools, 65 Mich App 472, 478; 237 NW2d 14 (1975):

> Even if the Board's action could also give rise to a grievance under the contract, the exhaustion doctrine wold be inapplicable to her constitutional claim. The mere fact that the same conduct is violative of both the constitution and the contract should not deny plaintiff immediate access to the court on her constitutional claim.

Here, as in Kewin, plaintiff argues, the same course of action by defendants has given to both contractual and constitutional claims. Assuming that a valid constitutional claim has been stated, of which the Court must take cognisance, and over which the Court alone has jurisdiction, plaintiff asserts the purposes of the exhaustion doctrine would not be served by accelerated dismissal of his contractual claim. After all, the argument goes, if the court must adjudicate the contractual claim at any rate, why not also adjudicate the contractual claim arising out of the same transaction? Would not the cause of judicial economy be frustrated rather than advanced by splitting the cause of action?

The argument is appealing, but not persuasive. It is defective in at least one important respect: plaintiff's consti-

tutional claim is not yet "ripe" for judicial review. Further, it will not be ripe until the contractual grievance procedures are exhausted. This conclusion is an unavoidable function of the nature of plaintiff's constitutional claim.

The theory of plaintiff's constitutional claim is that his dismissal represented deprivation of a property interest without due process of law, in violation of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 17 of the Michigan Constitution of 1963. Based on Board of Regents v Roth, 408 US 54; 92 S Ct 2701; 33 L Ed 548 (1972) and Perry v Sinderman, 408 US 593; 92 S Ct 2694; 33 L Ed 2d 570 (1972), plaintiff has argued forcefully that he had a legitimate claim of entitlement to continuing employment at LCC. This legitimate claim of entitlement is said to have constituted a property interest, of which plaintiff could properly be deprived only upon due process of law. It is plaintiff's position that, under the circumstances attending his dismissal,due process required, at minimum, appropriate notice and opportunity for hearing prior to his termination.

There is without question some support for plaintiff's position. Board of Regents, v Roth, supra. The support is not conclusive, however. In Rockwell v Crestwood School District, 393 Mich 616, 633-634; 227 NW2d 736 (1975), the Michigan Supreme Court provided the following guidance regarding the mandates of due process:

> When the government seeks to deprive a person of a property right and we accept arguendo, that a teacher's statutory rights under the teacher's tenure act constitute property - due process requires a "hearing appropriate to the nature of the case." Mullane v Central Hanover Bank and Trust Co. 339 US 306, 313; 70 S Ct 62; 94 L Ed 86 (1950)"The formality and procedural requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." Boddie v Connecticut, 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 1970). "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." Arnette v Kennedy, 416 US 134, 155; 94 S Ct 1633; 40 L Ed 2d 15, 34 (1974). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v McElroy, 367 US 886, 8; 81 SCt 1743; 6 L Ed 2d 1230 (1961).
>
> in its most recent expression on the subject the Supreme Court in Arnette v Kennedy, supra., rejected a due process challenge to a statute allowing the discharge of a Federal employee without a pre-disciplinary evidentiary hearing. A variety of rationales were espoused, but the uniform thrust of each opinion, including the dissents, is that the constitutional necessity of a pre-disciplinary hearing must be determined by balancing the competing interests of the government and the employee.

Clearly, due process is a flexible concept, its parameters to be defined on a case-by-case basis. It requires simply that a hearing be held "at a meaningful time and in a meaningful manner".Armstrong v Manzo, 380 US 545, 552; 85 SCt 1187;

14 L Ed 2d 62 (1965).

Plaintiff would have This Court determine that the procedure whereby he was dismissed was defective because he was not afforded an opportunity for hearing at a meaningful time The procedure claimed to be defective, however, has not yet reached finality. Pursuant to the contractual grievance procedures, of which plaintiff has availed himself, plaintiff is entitled to several informal "hearing" and finality, arbitration. Although these protective measures are available only after the fact of dismissal, it cannot be said at this point that they are not meaningfully timely. Clearly, post-dismissal hearings are not untimely per se. Arnette v Kennedy, supra. Whether the hearings held pursuant to the grievance procedures fail to meaningfully protect plaintiff's rights, is properly ascertainable only after those hearings have been held. Plaintiff's constitutional claim is, therefore, premature. Moreover, the constitutional claim may even be rendered moot since the grievance procedures, if allowed to run their course, may yield precisely that relief sought by plaintiff.

In holding that the Court may not properly address plaintiff's constitutional claim at this time, the Court does not purport to pass judgment on the merits of the claim. Certainly, if plaintiff is still aggrieved by the LCC action upon completion of arbitration, he may then renew his con-

stitutional claim. At this juncture, however, since the constitutional claim is not to be addressed by This Court, there is no reason not to invoke the exhaustion doctrine regarding plaintiff's contractual claim. Requiring plaintiff to exhaust the available grievance procedure will not only effectuate judicial policy favoring arbitration where appropriate, but will also preserve the integrity of the parties' contractual agreement, while perhaps rendering judicial resolution unnecessary. Accordingly, defendant's motion for accelerated judgment as to plaintiff's contractual claim, stated in Counts II, III, IV and V of the complaint, is granted.

Further, to the extent that plaintiff's complaint states a claim for violation of due process rights, it is dismissed, because its immaturity deprives This Court of subject matter jurisdiction, a fact which This Court may raise sua sponte Fox v Board of Regents of the University of Michigan, 375 Mich 238; 134 NW2d 146 (1965).

III. Tort Claim

Plaintiff's complaint, at Count VI, states a rather nebulous claim in tort. The language of the complaint indicates that plaintiff has attempted to any combination of three distinct tort claims: negligence, intentional infliction of emotional distress, and defamation. As This Court considers Count VI pursuant to defendant's motion for summary

judgment under GCR 1963, 117.2 (1), it is bound to view the pleadings in the light most favorable to plaintiff. Thus, the Court here evaluates the legal sufficiency of each of those three claims which plaintiff may have attempted to plead.

A. Negligence Claim. By alleging that defendants breached various duties, plaintiff ha intimated a simple negligence claim. defendants have asserted in response that plaintiff's negligence action against LCC is barred by governmental immunity. The foundation of governmental immunity in Michigan is established by MCLA 691.1407; MSA 3,996(107):

> Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed.

This Court is persuaded by those authorities cited by defendants that LCC, as a "political subdivision", is a governmental agency See MCLA 389.1 et seq; MSA 15.615 (101) et seq 691.1401(b); MSA 3.996 (101)(b), and Doan v Kellogg Community College, 80 Mich App 316; 263 NW2d 357 (1980). The Court is likewise satisfied that operation of a public community college is a governmental function. Holzer v

Oakland University, 110 Mich App 355; 313 NW2d 124 (1981), Lee v Highland Park School District, 118 Mich App 305; 324 NW2d 632 (1982). Plaintiff has not disputed either of these propositions and has not pleaded facts in avoidance of governmental immunity. Hence, This Court finds that LCC is protected from liability for negligence by governmental immunity. To the extent that plaintiff's complaint purports to state a negligence cause of action, defendant LCC is entitled to summary judgment for the reason that plaintiff has failed to state a claim upon which relief can be granted.

As to whether the Board of Trustees and individual named defendants are similarly protected, the test is somewhat different.

> Two separate tests have evolved for determining whether individual employees of an agency engaged in a governmental function are protected by the cloak of immunity. One test looks only to whether the individual defendants were acting within the scope of their employment. If so, they are entitled to the protection of governmental immunity. See Gaston v Becker, 111 Mich App 692, 699; 314 NW2d 728 (1981); Shwary v Cranetrol Corp, 119 Mich App 736; 326 NW2d 627 (1982). The other test provides immunity where the individual was fulfilling a discretionary as opposed to a ministerial duty. Cook v Bennett, 94 Mich App 93; 288 NW2d 609 (1979); Willis v Nienan, 113 Mich App 30; 317 NW2d 273 (1982)

Here, the conduct complained of is the manner in which the Board of Trustees and its members determined

that plaintiff would among those faculty members whose contracts would not be renewed. Plaintiff complains that defendants' decision to dismiss him was arbitrary and impugned his professional competence. By acting arbitrarily and in willful violation of his contractual and statutory rights, plaintiff argues, defendants breached their duty to treat him in a manner which would not subject him to emotional distress and public humiliation.

The language of Count VI itself indicates clearly that the conduct complained of constituted an exercise by defendant of discretionary authority within the scope of employment. By alleging that defendants acted arbitrarily, plaintiff has, in effect, alleged an abuse of discretion as the basis for his negligence claim. And certainly, it is difficult to envision a task that would involve more discretion than a forced staff reduction. Further, it can hardly be argued but that such task was undertaken by defendants in the course of employment. This Court is persuaded, therefore, that whether the "scope of employment" test or the "discretionary v ministerial" test be applied, defendants are entitled to governmental immunity. There is no factual development based on these pleadings which even when viewed in the light most favorable to plaintiff, could possibly justify recovery for negligence. Accordingly, summary judgment is granted in

favor of the Board of Trustees and individual defendants with respect to plaintiff's negligence claim.

B. Intentional Infliction of Emotional Distress

Plaintiff has also alleged in Count VI that the Board of Trustees, acting through David Froh, inflicted emotional distress upon plaintiff through statements made to the press. Paragraphs 51 and 52 of Count VI state as follows:

> 51. Defendant, Board of Trustees member, acting in that capacity, David Froh, made public statements to the press impugning plaintiff's competency and the competency of two of his colleges by citing that it was "obvious" which faculty should be laid off; that "the criteria we applied objectively in each case," which they were not, and that low student evaluations were an important factor in the final decision of whom to terminate.
>
> 52. That Defendant Board of Trustees member David Froh, and other Defendant administrators, knew or should have known that an intentional breach of Plaintiff's employment contract, the violation of his Board of Trustees granted Tenure Rights, his Teacher Tenure Rights, and the accompanying statements (paragraph 51, above) impugning his professional competence would result in emotional distress. That such arbitrary actions did, in fact, result in mental distress and public humiliation.

Although governmental immunity does not bar an action for intentional tort, Lockaby v Wayne County, 406 Mich 65; 276 NW2d 1 (1979), defendants maintain nonetheless, their motion for summary judgment, that has failed to state a

claim for emotional distress upon which relief can be granted. This Court agrees.

A fundamental element of an action for intentional infliction of emotional distress is "extreme and outrageous conduct" by the defendant. In this regard, Michigan courts have adopted those standards enunciated in 1 Restatement Torts, 2d. Ledsinger v Burmeister, 114 Mich App 12; 318 NW2d 58 (1982) Section 46, comment d, p 73 of the Restatement states:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous:" The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

Applying this definition, the Court finds as a matter of law that the conduct here alleged to have caused emotional distress is not, by any stretch of the imagination, extreme and outrageous. Defendants' motion for summary judgment as to [plaintiff's claim for intentional infliction of emotional distress is therefore granted.

C. Defamation. It is conceivable that plaintiff has also

attempted to state a cause of action for defamation in paragraph 51. of Count VI, supra. A communication is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter others from associating with him Nuyen v Slater, 372 Mich 654; 127 NW2d 369 (1964) In assessing whether language is defamatory, a communication is accorded that meaning which is most natural and is actually fairly accepted under the particular circumstances. Ledsinger v Burmeister, 114 Mich App 12, 21; 318 NW2d 558 (1982). Further, a communication cannot be defamatory unless it is untrue. Potsill v Booth Newspapers, Inc., 118 Mich App 608; 325 NW2d 511 (1982).

The only communication alleged in paragraph 51 which could possible be construed as defamatory are David Froh's alleged statements that "low student evaluations were an important factor in the final decision of whom to terminate" and "it was obvious which faculty should be laid off". However, plaintiff has not even alleged that these statements are false, thus neglecting an important if not essential, element of his defamation claim.

Now do the pleaded facts overcome the qualified privilege asserted by defendant. In Potsill v Booth Newspapers, Inc. supra., the Court of Appeals reaffirmed the long-standing rule of qualified privilege:

> [A] qualified privilege exists for "all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty." Id, 118 Mich App 621, quoting Bacon v Michigan Central Railroad Co., 66 Mich 166, 170; 33 NW 181 (1887).

This definition appears to have been "tailor-made" for the instant case. Both Mr. Froh and the reporter to whom he made the statement had legitimate and corresponding interests and duties regarding the dismissal of faculty members. Yet the privilege afforded by this relationship of interests and duties is a qualified privilege. It is not available to one who makes a false statement with common law malice, ill will or bad faith. Potsill, supra., 118 Mich App 621. Plaintiff has neither alleged falsity nor facts from which the court could infer that the statements were made with malice. In Nuyen v Slater, supra., the Michigan Supreme Court evaluated a similar situation:

> Where a qualified privilege exists there is a presumption of good faith. In Konkle v Haven, 140 Mich 472, 478, the Court stated:
>
> "The presumption in cases of privileged communications is that the person acts in good faith and from proper motives. If there is anything in the alleged libelous article or in the surrounding circumstances which shows a bad or vindictive spirit or a feeling or hatred or ill will, the question belongs to the jury. If there is not, it belongs to the court, as a question of law."

The same principle was commented upon in Raymond v Croll, 233 Mich 268, 275, 276, wherein it was said:

> "To overcome the presumption of good faith the circumstances must be such as to show that the defendant was actuated by a bad motive, which led to take advantage of the occasion to injure the plaintiff. The court should not permit dishonesty of purpose to be lightly inferred from acts which are just as consistent with good faith as with bad faith. If the circumstances relied upon as showing malice are as consistent with its nonexistence as with its existence, the plaintiff has not overcome the presumption of good faith, and there is nothing for the jury." Id, 372 Mich 660.

Plaintiff's general conclusory allegations that the Board of Trustees, through David Froh, acted maliciously, is not sufficient to overcome the presumption of good faith which attaches to defendant's qualified privilege. Id, 372 Mich 661.

Plaintiff's defamation claim thus lacks essential elements and cannot survive defendant's motion for summary judgment. The defamation claim is therefore dismissed.

Counts I through V of plaintiff's complaint are hereby dismissed pursuant to GCR 1963, 116, because the claims therein stated are, for various reasons, not yet "ripe" for judicial consideration. The Court's holding does not prejudice plaintiff's right to seek judicial relief in the future if, upon exhaustion of administrative and contractual remedies, plaintiff should still be aggrieved.

As to Count VI of the complaint, summary judgment

is granted in favor of all the defendants pursuant to GCR 1963, 117.2(1). The factual basis for the tort claim, whatever its nature, appears to have been non-existent and, in any case, was not pleaded.

IT IS SO ORDERED

Dated: March 9, 1984

S/_____
Robert Holmes Bell,
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DAVID ARGANIAN,

Plaintiff,

V.

LANSING COMMUNITY COLLEGE, THE BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, PHILIP J. GANNON, President and SAM KINTZER, Divisional Dean, Lansing Community College,

Defendants.

_____/

At a session of said Court held in the Circuit Courtrooms, County Building, city of Mason, Ingham County, Michigan on the 15 day of February, 1984.

Present: Hon. Robert Holmes Bell, Circuit Judge.

Defendants having filed a motion for accelerated judgment on counts I-V and a motion for summary judgment on Count VI of the First Amended Complaint filed by Plaintiff, and said motion having further prayed that an order be entered staying discovery or any other proceedings in this cause until such time as a decision is made on said motions, and subsequent to the filing of said motions, Plaintiff's counsel having served upon Defendants' counsel notices of taking depositions, requesting the appearance of two of the Defendants and two other employees of Lansing

Community College at the offices of the Plaintiff's attorney; and Defendants having filed a Motion to Stay Discovery, a hearing on which was held before this Court on February 8, 1984; and the Court being well advised in the premises;

IT IS HEREBY ORDERED that all discovery, including, but not by way of limitation, the taking of the depositions of the persons named in the notices heretofore served, be and is hereby stayed, pending a decision upon Dependants' motions for accelerated and summary judgment.

IT IS FURTHER ORDERED that in the event it becomes necessary to take depositions following the Court's decision on the aforesaid motions, said depositions shall be taken at a time, date and neutral place to be agreed upon by counsel for both parties.

S/_____
ROBERT HOLMES BELL
Circuit Judge

attest:
BETTY J. ST. JOHN

APPROVED AS TO FORM
S/_____
Joseph A. Warren
Attorney for Plaintiff

Dated: February 12, 1984

Lansing Community College
419 N. Capitol Ave., Box 40010
Lansing, MI 48901

July 22, 1983

Mr. David Arganian
716 Ann Street
East Lansing, MI 48823

Dear David:

At the Board of Trustees meeting on July 22, 1983, a Plan to balance the College's budget was adopted by the Board of Trustees. In achieving this objective, the Board decided, in part, to reduce staff. Unfortunately, you were among those individuals whom the College found it necessary to dismiss as a part of its staff reduction.

Pursuant to the College's agreement with the Lansing Community College Chapter of the Michigan Association for Higher Education (MAHE), you are hereby given notice that forty-five (45) calendar days hereafter your employment by the College will cease. We regret this action is necessary, but believe the best interests of the College dictate this course of action.

We trust you will discuss with your divisional or departmental head the details of completing your assignment with the College.

Very truly yours,
S/
Ronald E. Dove
Director of Personnel
/TV